Supreme Court, U.S.
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No. 00-706

In The

Supreme Court of the United States

HOGAN MANAGEMENT SERVICES, P.C.,

Petitioner,

v.

JOSEPH A. MARTINO, M.D., d/b/a
NORTH GEORGIA ORTHOPAEDICS, P.C.,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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22 pp

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petitioner is Hogan Management Services, P.C. The Respondents are Joseph A. Martino, M.D., and North Georgia Orthopaedics, P.C. North Georgia Orthopaedics, P.C. has no parent corporation and no publicly held company owns 10% or more of North Georgia Orthopaedics, P.C.'s stock.

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STATEMENT OF THE CASE

1. Procedural History

This case involves the construction of restrictive covenants contained in a private contract of employment under Georgia law. Petitioner Hogan Management Services, P.C. ("Hogan") filed suit against Respondents North Georgia Orthopaedics, P.C. ("NGO") and its president, Joseph A. Martino, M.D. ("Dr. Martino") (collectively referred to as "Respondents"), alleging violations of restrictive covenants contained in the employment contract between Hogan and NGO (the "Contract") and seeking injunctive relief.

On August 4, 1995, the Superior Court of Forsyth County, Georgia issued a TRO restraining NGO and Dr. Martino from competing with, or soliciting any patients of, Hogan until an interlocutory hearing could be held. The trial court refused Dr. Martino's request that Hogan be ordered to post a bond for damages caused by the TRO. NGO and Dr. Martino answered the complaint stating that the restrictive covenants were illegal and unenforceable as a matter of law, raising a number of affirmative defenses including Hogan's breach of contract, fraud, unclean hands and estoppel. Dr. Martino asserted a counterclaim for his damages caused by the wrongful restraint.

At the interlocutory hearing on September 5, 1995, evidence was presented regarding the duration, scope of activity, and territorial limits of the restrictive covenants, and the effect upon the public if the restrictive covenants were enforced. Additionally, the trial court heard the

evidence concerning Hogan's breaches, unclean hands and other defenses to the injunctive relief sought.

On October 16, 1995, the trial court entered an Order dissolving the TRO and dismissing Hogan's complaint. Based upon long-standing Georgia Supreme Court precedent, the trial court found as a matter of law that *both* the non-compete and non-solicitation clauses were unreasonable, void and unenforceable. The trial court found as a matter of fact that the Contract did not involve the sale of a business and, following binding Georgia precedent, refused to "blue pencil" the illegal covenants.

Hogan appealed to the Georgia Supreme Court. On motion of NGO and Dr. Martino, the case was transferred to the Georgia Court of Appeals. Hogan's appeal was then dismissed by the Georgia Court of Appeals because Dr. Martino's counterclaim was still pending, Hogan had failed to obtain certification of less than all issues pursuant to O.C.G.A. § 9-11-54(b), and, therefore, the appeal was premature.

On remand to the trial court, the parties filed cross-motions for summary judgment on the counterclaim. Hogan also moved the trial court for reconsideration of its October 16, 1995 Order dismissing the complaint. Ultimately, the trial court dismissed the counterclaim on the ground that the trial court's decision not to require Hogan to post a bond – even though Dr. Martino had requested one – barred Dr. Martino's cause of action. The court denied Hogan's motion for reconsideration of the October 16, 1995 Order, and, in an amended order, also rejected Hogan's constitutional claim.

Hogan again appealed the trial court's October 16, 1995 Order, and Dr. Martino cross-appealed the trial court's dismissal of his counterclaim. On March 3, 2000, the Court of Appeals decided both cases. With respect to Hogan's appeal, the court held that Hogan's appeal was moot. The eighteen (18) month time period applicable to the restrictive covenants had expired. Under Georgia law, it was not tolled during the pendency of litigation, and could not be judicially tolled. Thus, Hogan could not obtain the injunctive relief it sought in its complaint. Accordingly, the court affirmed the trial court's October 16, 1996 Order dismissing Hogan's complaint.[1]

Regarding Dr. Martino's cross-appeal, the court of appeals reversed the trial court's dismissal of the counterclaim. The court held that Dr. Martino's cause of action for wrongful restraint under O.C.G.A. § 9-11-65(c) was not barred by the trial court's refusal to order Hogan to post a bond. The court further held that the restraint was wrongful as a matter of law, and granted Dr. Martino's motion for partial summary judgment as to Hogan's liability for wrongful restraint. It remanded the case for trial on the issue of Dr. Martino's damages. *Hogan Management Services, P.C. v. Martino*, 242 Ga. App. 791, 530 S.E.2d 508 (2000), *cert. denied*. Hogan's petitions for certiorari to the Georgia Supreme Court were denied, as were Hogan's motions for reconsideration. Hogan now petitions this Court for certiorari.

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[1] The court of appeals also held that, even if the appeal was not moot, the trial court was correct in finding that the restrictive covenants were unenforceable as a matter of law.

2. The Trial Court's Order Which The Georgia Appellate Courts Affirmed

The Contract which is the subject of this litigation contains two restrictions: (a) a covenant not to compete, and (b) a covenant not to solicit. The covenants are found in Paragraph 7 which provides in pertinent part:

> *Covenant Not to Compete.* In the event of termination of this Agreement, Provider agrees that Provider will not, within a period of eighteen (18) months, engage in the practice of medicine or surgery within a radius of ten (10) miles of any ***practice site(s)*** at which Provider has practiced under this Agreement . . . Provider further agrees not to solicit ***any patients of the Corporation*** to become the patients of Provider. . . . (emphasis added)

The trial court properly noted that contracts in general restraint of trade which tend to lessen competition are against public policy and void under the Georgia Constitution. Ga. Const. Art. III, Sec. IV, Para. V(c) (1983); O.C.G.A. § 13-8-2. Restrictive covenants contained in employment contracts are considered to be in partial restraint of trade and will be upheld *only* if strictly limited in time, territorial effect and scope of activity such that they reasonably protect the interests of the party in whose favor it is imposed, and do not unduly prejudice the interests of the public. *W. R. Grace & Co. v. Mouyal,* 262 Ga. 464, 422 S.E.2d 529 (1992). A restrictive covenant is unenforceable as an unreasonable restraint on trade if, at the time the contract is formed, it is *indefinite* or if it is *overbroad* as to time, territorial limitation or scope of

activities prohibited. *Koger Properties v. Adams-Cates Company*, 247 Ga. 68, 274 S.E.2d 329 (1981); *Durham v. Stand-By-Labor*, 230 Ga. 552, 198 S.E.2d 145 (1973).

Regarding the non-compete clause, the trial court found that the territorial scope was indefinite and unenforceable. It depended upon the location of "practice site(s)" which were undefined in the Contract,[2] and which were not capable of determination at the formation of the Contract.[3]

Regarding the non-solicitation clause, the trial court found it unreasonable because it did not contain the necessary time limitation, *Marcoin, Inc. v. Waldron*, 244 Ga. 169, 259 S.E.2d 433, 434 (1979), and because the prohibition against solicitation of "any" of an employer's customers, whether or not a relationship existed between

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[2] Hogan's implication that the restrictive covenants were "negotiated" is disputed. Hogan and its attorney drafted the restrictive covenant. Hogan could have defined the term "practice site(s)" to mean specific locations, but failed to do so.

[3] That the term is vague and ambiguous is evidenced by Hogan's own inability to locate the "practice site(s)," even after the contract had been terminated. Under the guise of "clarification," Hogan alleged there were eight (8) "practice sites." One was an office operated by Healthsouth, five were hospitals that Hogan did not operate or manage, and one was a hospital in downtown Atlanta where Dr. Martino had never furnished any services, and apparently Dr. Hogan had not either. Hogan did not show any legitimate business interest to be protected in Atlanta. Later, in its complaint, Hogan claimed the term meant two offices and one hospital located in Forsyth County. As the trial court stated, Hogan's willingness to be more reasonable later did not cure the overbreadth of the restrictive covenant as written.

the customer and the former employee, is an unreasonable and overbroad attempt to protect the employer's interest, even if confined to a specific geographic area. *W. R. Grace*, 262 Ga. 464, 422 S.E.2d 529, 532 (1992).

The trial court refused to sever the covenants, or to "blue pencil" them. Under Georgia law, courts may not sever or blue pencil illegal restrictive covenants except when they are ancillary to the sale of a business. *Ward v. Process Control Corp.*, 247 Ga. 583, 277 S.E.2d 671 (1981).[4] The trial court found as a matter of fact that the Contract did not involve the sale of a business.[5]

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[4] Even in cases involving the sale of a business, Georgia courts do not have a license to reform or rewrite restrictive covenants under the guise of blue-penciling. "Blue-penciling marks, but it does not write . . . it may not rewrite a contract void for vagueness, making it definite by designating a new, clearly demarcated area." *Hamrick v. Kelley*, 260 Ga. 307, 392 S.E.2d 518, 519 (1990) (court refused to rewrite restrictive covenants ancillary to a sale of a business which were vague as to territorial application). Thus, "blue penciling" would not help Hogan. As the trial court found, both the non-compete and the non-solicitation clauses are void on independent grounds. Even if severed, they are both illegal. Moreover, the non-compete clause is vague in its territorial application and, like in *Hamrick*, it cannot not be salvaged even with the "blue pencil."

[5] The trial found that Paragraphs 11 and 12 of the Contract expressly state that the Contract is not intended to create a partnership or joint venture between Hogan and Respondents. Consideration did not flow equally between the parties – Dr. Hogan made many times the fee paid to NGO. There were no equal rights of control. Respondents acquired no equity interest in Hogan. The Contract does not contain any buy-in provision. Respondents held no official status with Hogan, they were not

REASONS FOR DENYING THE WRIT

1. This Court Lacks Jurisdiction

For this court to have jurisdiction, a live controversy must exist at all stages of review. This court may not review cases that are moot. *See DeFunis v. Odegaard*, 416 U.S. 312, 94 S. Ct. 1704, 40 L.Ed.2d (1974). Also, this court is barred from reviewing cases wherein the state court's decision is based upon adequate non-federal grounds, either substantive or procedural. *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875); *Henry v. Mississippi*, 379 U.S. 443, 85 S. Ct. 564, 13 L.Ed.2d 408 (1965).

Under Georgia law, dismissal of a moot appeal is mandatory. O.C.G.A. § 5-6-48(b)(3). The Georgia Court of Appeal held that Hogan's appeal of the trial court's October 16, 1995 Order was moot because, by the time Hogan perfected its appeal, the eighteen (18) month time period applicable to the illegal restrictive covenants had expired. Under Georgia law, the pendency of litigation over restrictive covenants does not toll the running of the contractual time period during which the covenants, if valid, would apply. *Coffee System of Atlanta v. Fox*, 227 Ga. 602, 182 S.E.2d 109 (1971); *see also Electronic Data Systems Corp v. Heinemann*, 268 Ga. 755, 493 S.E.2d 132 (1997). Where a complaint seeks injunctive relief, appeals taken after the expiration of the contractual time period are

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owners of or shareholders in Hogan, and had no voting rights in Hogan. Respondents had no authority to hire or fire employees. Respondents' benefits and responsibilities were established by the Contract. There were no reciprocal restrictive covenants extracted from Hogan or its sole physician employee, Dr. Hogan.

moot. *Southern Intermodal Logistics, Inc. v. Taylor Maid Transportation, Inc.*, 255 Ga. 390, 338 S.E.2d 678 (1986). Moreover, in the absence of a contractual tolling provision, judicial tolling is prohibited. "Such an extension would in effect rewrite the [time period] of the agreement. Courts do not make contracts for the parties." *Coffee System*, 182 S.E.2d at 110.

The essence of Hogan's Petition is that Georgia courts improperly "classify" restrictive covenants as ancillary to employment or the sale of a business in deciding whether to "blue pencil" them. But the cases applicable to the mootness issue *do not* involve such "classification." The cases holding that appeals taken after the expiration of the contractual time period are moot, and barring tolling (either judicially or by operation of law), apply to *all* restrictive covenants, whether they are ancillary to employment or to the sale of a business. *Coffee Systems, supra* (employment contract – no judicial tolling); *Southern Intermodal, supra* (sale of a business – no judicial tolling). In other words, the Georgia courts in this case did not engage in "classification" in ruling that Hogan's appeal is moot. Thus, there are adequate non-federal grounds supporting the Georgia courts' ruling, and this Court lacks jurisdiction to review it.

Also, there are adequate non-federal grounds for the Georgia courts' ruling regarding the cross-appeal of Dr. Martino. The Georgia Court of Appeals reversed the trial court's dismissal of Dr. Martino's counterclaim because the trial court incorrectly interpreted a Georgia statute, O.C.G.A. § 9-11-65(c). Hogan has not raised any federal constitutional issue with respect to court of appeals'

interpretation of that statute. Since Hogan's appeal concerning the restrictive covenants is moot, and since the Georgia law governing the mootness issue does not involve any constitutionally challenged classification, the trial court's October 16, 1995 Order has been affirmed and is final. That final Order states that the restrictive covenants were void and unenforceable as a matter of law. That is an adequate non-federal basis for the Georgia Court of Appeals' holding that the TRO was wrongful as a matter of law, and that Dr. Martino is entitled to partial summary judgment on the issue of liability for a wrongful restraint under O.C.G.A. § 9-11-65(c).

Hogan's Petition for Writ of Certiorari is meritless, especially in light of the obvious absence of jurisdiction. It should be denied.

2. Even on the Merits, Hogan's Constitutional Arguments are Frivolous

Hogan is *not* arguing that the illegal and void restrictive covenants are, in fact, legal. Rather, Hogan wants the courts to resurrect those void covenants by judicially rewriting them to make them legal. The Georgia courts have refused at every level.

In a nutshell, Hogan claims that Georgia law, which prohibits "blue-penciling" of illegal restrictive covenants in employment contracts, but allows it when the covenants are ancillary to the sale of a business, operates as an unconstitutional "classification" based upon an "irrebutable presumption" that employment contracts are "adhesive contracts." Hogan claims that such "classification" violates substantive due process and deprives it of equal

protection of the laws. For the reasons stated below, Hogan's constitutional arguments are bogus.

a. Hogan Has Not Been Denied Due Process

Hogan's substantive due process claim is facially absurd. As a threshold matter, Hogan must show that Georgia law impacts some fundamental right of Hogan rooted in the Constitution. *Michael H. v. Gerald D.*, 491 U.S. 110, 122, 109 S. Ct. 233, 105 L.Ed.2d 91 (1989), *reh. den.*, 492 U.S. 937 (1989), *2nd reh. den.*, 499 U.S. 984 (1991), *mot. to amend den.*, 504 U.S. 905 (1992). Hogan has not shown that the U.S. Constitution establishes any fundamental right to have courts judicially edit private contracts and enforce *illegal* contract provisions that are void and unenforceable as against Georgia public policy. Respondents certainly are not aware of any such right, either expressed in the Constitution or in any case law.

Second, Hogan's contention that the alleged "classification" is based upon an "irrebutable presumption" that employment contracts are "contracts of adhesion" is not true. Any classification is based upon the employee's "unequal bargaining power," not because they are adhesive in every case. *See Watson v. Waffle House, Inc.*, 253 Ga. 671, 324 S.E.2d 175, 177 (1985). As the Georgia Supreme Court very practically observed, one who lacks the power to prevent his own termination, even an important employee, does not have equal bargaining clout with the employer who can fire him. *White v. Fletcher/Mayo/Associates*, 251 Ga. 203, 303 S.E.2d 746, 750 (1983).

Finally, even if Georgia's approach to the construction of restrictive covenants creates an irrebutable presumption, it does not violate due process. If the "irrebutable presumption" doctrine is still alive as applied to economic issues,[6] the test of constitutionality is whether the presumptions are arbitrary or lacking in rational justification. *Weinberger v. Salfi*, 422 U.S. 749, 768, 95 S. Ct. 2457, 45 L.Ed.2d 522 (1975).

In the present case, the test is easily satisfied. The compelling reasons supporting the Georgia law prohibiting "blue penciling" of restrictive covenants in employment agreements has been stated by the Georgia Supreme Court:

> For every [restrictive] covenant which finds its way into court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction. If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down

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[6] As one federal appeals court stated, "the irrebutable presumption doctrine was a strange hybrid of procedural due process and equal protection invented by the Supreme Court in the early 1970s and laid to rest soon after," and stating that *Vlandis v. Kline*, 412 U.S. 441 (1973), the leading case advancing the doctrine, was "effectively overruled" by *Salfi*. *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988).

> and enforced . . . ." *Richard P. Rita Personnel Services, Inc. v. KOT*, 229 Ga. 314, 191 S.E.2d 79, 81 (1972).

The Georgia Supreme Court concluded that the reasons favoring "blue penciling" are not of sufficient weight to offset those reasons for refusing to apply the doctrine. "In short, we have weighed the 'blue-pencil' doctrine in the balance, and found it wanting." *Id.* Georgia courts have been asked to blue-pencil or sever restrictive covenants many times since and have declined. *See, e.g., Howard Schultz & Assoc. v. Broniec*, 239 Ga. 181, 236 S.E.2d 265, 268 (1977) *and cases cited therein*. Just a few years ago, in *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 405 S.E.2d 253 (1991), the Supreme Court held that O.C.G.A. § 13-8-2.1, a statute which would have allowed blue-penciling of otherwise unenforceable restrictive covenants contained in employment contracts, was unconstitutional.

Georgia courts are permitted to "blue pencil" restrictive covenants ancillary to the sale of a business because the transaction is intended to transfer the seller's business prospects and goodwill, there is little risk of injury to the public, and the parties have equal bargaining position. *Jenkins v. Jenkins Irrigation, Inc.*, 244 Ga. 95, 259 S.E.2d 47 (1979). As the *Jenkins* court stated, such is not the case with employment contracts. *Id.* at 50.

The facts of this case provide a graphic textbook illustration of the *in terrorem* effect – i.e., illegal restrictive covenants used by an employer to intimidate an employee and restrain competition. The evidence at trial showed that for years Dr. Hogan was the only orthopaedic surgeon living in Forsyth County and had little

competition. In May 1994, Dr. Hogan met Dr. Martino, a young, Board-eligible and Fellowship-trained orthopaedic surgeon with spectacular credentials. He learned that Dr. Martino was about to move to Forsyth County, accept a highly paid position with Mountainside Medical Center in adjacent Pickens County ("Mountainside"), and open a satellite office in Forsyth County. Dr. Martino not only would cut off Dr. Hogan's flow of patients from Pickens County, he would be taking a third of the "call" at Baptist North (an important source of new patients and cases) and otherwise competing with him.

Hogan then lured Dr. Martino into the Contract and under restrictive covenants based upon fraudulent misrepresentations. The goal was to control and eventually eliminate the imminent competition which threatened Hogan's virtual monopoly upon orthopaedic medicine in Forsyth County. The record is filled with facts supporting these contentions. After the position at Mountainside was filled by another physician, Hogan terminated the contract – while "the ink was still wet" as Dr. Martino testified – and attempted to coerce Dr. Martino into taking a pay cut of 50% by claiming that Dr. Martino otherwise would be barred by the restrictive covenants from practicing in Forsyth County and virtually all of the surrounding counties, including places where Dr. Martino had never practiced before and where Hogan had no legitimate business interest.

This is *not* a case of Dr. Martino working for Hogan for years, and then quitting to set up a competing practice. Rather, Hogan fired Dr. Martino after only a few months knowing that if Dr. Martino refused to accept a 50% pay cut, he had only two choices: to move his family

out of their new home and out of North Georgia (which, as a practical matter, would permanently eliminate him as competition), or to compete and face expensive litigation with a wealthy entity such as Hogan. Dr. Martino chose the latter and, though he successfully challenged the enforceability of the illegal restrictive covenants, Dr. Martino was deprived of work for three months and still is being forced to incur thousands of dollars in legal expenses.

The Georgia law at issue is neither arbitrary nor unreasonable. It strikes the correct balance of minimizing restraints on trade, protecting employees from intimidation, and protecting legitimate interests of employers. The classification furthers the state's legitimate interest in preventing employers from stifling competition with overly broad restrictive covenants, and then counting on the courts to later make them reasonable. Under Georgia law, those employers who draft restrictive covenants that are definite and reasonable in scope will have them enforced. *See, e.g., Smith v. HBT, Inc.*, 213 Ga. App. 560, 445 S.E.2d 315 (1994). Those who get greedy and overreach will not have their covenants enforced. The burden is placed properly upon the employer to be reasonable and to avoid drafting illegal and punitive covenants. Under any level of scrutiny, Georgia's law prohibiting "blue penciling" of illegal restrictive covenants in employment agreements "fits" the policy that the classification serves.

In summary, Hogan has no constitutionally protected interest in the enforcement of illegal covenants in a private contract. The covenants are void from inception.

Moreover, the rationale supporting Georgia law is obviously reasonable and calculated to protect a legitimate state interest in competition. The alleged classification satisfies any requirements imposed by the Constitution, and Hogan's challenge to it on constitutional grounds is an exercise in futility.

b. Hogan Has Not Been Denied Equal Protection of the Law

For the same reasons, Hogan's equal protection claim lacks merit. Hogan has not shown that it is a member of a suspect class, or that any fundamental right has been impacted. Therefore, the constitutional test of an alleged illegal economic classification is whether it has any conceivable relationship to any legitimate state interest. *Williamson v. Lee Optical Company*, 348 U.S. 483, 75 S. Ct. 461, 99 L.Ed. 563 (1955).

The analysis is virtually the same as above, and will not be repeated in detail here. Suffice it to say that the Georgia Constitution is hostile to restraints on competition. The restrictive covenants at issue here are unreasonably vague and overbroad, and therefore void and unenforceable. Since this Contract did not involve the sale of a business, Georgia courts will not "blue pencil" the covenants to make them enforceable. The reason: to prevent the *in terrorem* effect. If "blue penciling" were allowed, employers like Hogan would get away with using illegal covenants to stifle competition, in contravention of public policy, and then rely upon the courts to pare them down and enforce them. *Rita Personnel*, 191 S.E.2d at 81.

In summary, Georgia law is reasonably calculated to protect a legitimate state interest grounded in the Georgia constitution. It does not violate due process or the equal protection clause of the U.S. Constitution. Thus, this Court should deny Hogan's petition and put a merciful end to this seemingly endless litigation.

CONCLUSION

For the foregoing reasons, this Court should deny Hogan's Petition for Writ of Certiorari, and award Respondents their costs and attorney fees.

Respectfully submitted,

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